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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

## No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

*Petitioners,*

VS.

PEOPLE OF THE STATE OF CALIFORNIA, EX REL. STATE WATER RESOURCES CONTROL BOARD, AND STATE OF WASHINGTON, ET AL.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## Brief for the Respondent, State of California

### SUMMARY OF ARGUMENT

The central purpose of the 1972 amendments to the Federal Water Pollution Control Act was to provide, first, for the development of standards for effluent discharges rather than ambient water quality, and, second, for the development of standards for individual dischargers by the issuance of permits. The states are authorized to adopt programs for the issuance of permits under section 402(b) of the act. Nothing in that section provides an exemption for federal dischargers from such state programs.

Moreover, section 313 of the act requires federal dischargers to comply with state "requirements respecting

control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." That section confirms and clarifies the obligation of federal dischargers to comply with state permit programs under section 402(b). Section 313 is not intended to limit federal compliance to effluent "limitations" and "standards" adopted by the states under the act, as contended by the petitioners; those terms are used in a precise sense in the act, and Congress would have used those terms in section 313 if it had intended for the section to be so limited.

The authority of the Administrator of the Environmental Protection Agency to issue permits to federal dischargers, in states where he operates his own permit program, is based on sections 402 and 313, the same sections which provide such authority to the states. Thus, if the Administrator has authority to issue permits to such dischargers, so do the states. Otherwise, such dischargers would be free of any permit control under the act.

Other statutory references support this view. Section 505(f) specifically describes a "requirement" in section 313 as including a permit issued under section 402. Section 510 specifically distinguishes between a "requirement respecting control or abatement of pollution"—the phrase used in section 313—and a "standard or limitation," thus undercutting the petitioner's position that these phrases are synonymous. The reference to "reasonable service charges" in section 313 denotes charges levied by the states for permit applications submitted by federal dischargers, thus indicating that states have authority to issue permits to such dischargers. Sections 308 and 306, which provide exemptions for federal dischargers from certain state programs under the act, do not imply an exemption for such



dischargers from state permit programs under section 402(b), and indeed such an exemption was expressly rejected by Congress.

The petitioner's interpretation of the act is administratively impractical. The petitioner concedes that the states have authority to formulate the "effluent limitations"—consisting of conditions relating to numerical and time limitations—in permits issued to federal dischargers. It is administratively unsound to deny the states authority to issue the permit containing such conditions. The states achieve no additional "control" over federal dischargers by their authority to issue such permits, since any such "control" results from their authority to formulate and administer the conditions in such permits, not to issue the permit itself.

The act's legislative history is silent concerning the issues in this case. Any inferences in this history support the position of the respondents, not the petitioner.

The Administrator's interpretation of the states' authority under the act is, *per se*, entitled to no weight in construing such authority.

The federal principles found in the Supremacy Clause and Plenary Powers Clause are helpful in defining the limits of state authority where the state acts pursuant to its inherent, reserved powers in furtherance of a policy peculiar to the state, but not where—as here—it acts pursuant to a congressional directive in furtherance of a national policy set by Congress. Further, Congress built ample safeguards into the act to limit the intrusion of states upon federal activities and enclaves, and these safeguards fulfill the purposes of these constitutional principles.

Section 118 of the Clean Air Act, in defining the obligation of federal agencies to comply with state "requirements" under that act, contains language similar to that found in section 313 of the Federal Water Pollution Control Act. The similarity between these and other sections of the acts might justify a harmonious construction of sections 313 and 118. However, the dissimilarities between the acts, particularly with respect to the states' express authority to issue permits under the water act, might justify the opposite result. In any event, the water act was amended in 1972 to remove any ambiguities which remain in the air act. Accordingly, section 118 might be construed in light of the meaning of section 313, but not *vice versa*.

## ARGUMENT

### I. The Language, Structure and Objectives of the Water Act Indicate That Federal Dischargers Must Comply with State Permit Programs Adopted Under the Act.

The petitioner argues that this case hinges on the meaning of section 313 of the Federal Water Pollution Control Act (the "water act"), which requires federal agencies and instrumentalities to comply with federal and state "requirements respecting control and abatement of pollution . . . ." 33 U.S.C. (Supp. III) §§ 1251-1376, 1323. He argues that this section must be interpreted similarly to section 118 of the Clean Air Act (the "air act"), 42 U.S.C. §§ 1857-1858a, 1857f, which uses similar language in describing the obligation of federal agencies under that act. Finally, he asserts that the word "requirements" in these sections denotes "substantive" requirements, such as effluent "limitations", but not "procedural" requirements such as permits.

The petitioner fundamentally misconceives the language, structure and objectives of the water act. By focusing on



the meaning of section 313, he ignores the fact that this case hinges principally on the meaning of section 402 of the water act, 33 U.S.C. (Supp. III) § 1342, which authorizes states to issue permits under the act; section 313, rather than imposing an independent obligation on federal agencies, only confirms and clarifies the obligation imposed on such agencies by section 402. By reading section 313 in light of section 118 of the air act, he ignores the fundamentally different approaches of the water and air acts to the problem of pollution; this difference derives from the fact that—although the acts were substantially similar prior to 1972—the water act was fundamentally restructured by amendments passed in that year, and the air act was not. By distinguishing between permits and effluent "limitations," the petitioner ignores the fact that the mechanism by which such "limitations" are formulated and applied to individual dischargers is by the permit system established in section 402. To fully appreciate the extent to which the petitioner misconceives the water act, it is necessary to first trace the historical evolution of the act to fully understand its purposes.

#### A. The Primary Purpose of the 1972 Amendments to the Water Act Was to Provide Standards for Effluent Limitations Rather Than Ambient Water Quality, to Provide for the Development of Such Standards for Individual Dischargers by a Permit System and to Make the States Primarily Responsible for the Administration of the Permit System.

The water act, amended extensively since its passage in 1948, has provided for increasingly tougher controls over water polluters, in an effort to eradicate the national cancer of water polution. An underlying theme of the act, since its original passage, has been that the states have the primary

responsibility for achieving that goal.[1] Until 1972, however, the act failed to provide clear and effective directives as to how that goal was to be achieved.

The original 1948 act provided that the U. S. Surgeon General was to develop "programs" for the prevention of water pollution. 62 Stat. 1155 (1948). The programs were to be enforced by abatement actions brought by the states, *id.* at 1156, and by federal officials in instances where the states failed to act, *id.* at 1156-1157. The act declared a congressional policy to "recognize, preserve, and protect the primary responsibilities and rights" of the states to prevent water pollution. *Id.* at 1155. No mention was made of the types of programs which were to be adopted and enforced under the Act, much less the obligation of federal dischargers under the act.

The act was amended in 1956 to enlarge the authority of the states to meet their responsibilities under the act, and to provide for increased cooperation between federal and state agencies towards that end. The amendments authorized each state to develop a "plan," subject to approval of the Surgeon General, setting forth methods for improving water quality. 70 Stat. 498, 500 (1956). The plan was to be enforced by abatement actions brought by state or federal officials. *Id.* at 504-505. Federal dischargers were

1. Senate Report No. 92-414, discussing the proposed amendments to the act, commented:

> "For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States." S. Rep. No. 92-414, 92nd Cong., 1st Sess. 1 (1971), 2 *Legis. Hist.* 1419.

"*Legis. Hist.*" refers to the legislative history of the water act compiled by the Environmental Policy Division of the Library of Congress in two volumes. See *A Legislative History of the Water Pollution Control Act Amendments of 1972* (Comm. on Publ. Works Print, 1973).



directed to "cooperate" with the states, to the extent "practicable and consistent with the interests of the United States and within any available appropriations." *Id.* at 506. The admonition was repeated that the states bear the "primary responsibilities and rights" for preventing water pollution. *Id.* at 498. However, the amendments failed to provide clear directives as to how the states were to attain that objective, and largely gave federal dischargers the option of voluntarily complying with such programs as the states might develop.

Amendments in 1965 and 1970 strengthened and clarified the authority of the states, and the obligation of federal dischargers to comply with their exercise of authority. The 1965 amendments authorized the states to adopt "water quality standards," which included both "water quality criteria" and a "plan" for the "implementation and enforcement" of the criteria. 79 Stat. 903, 908 (1965).[2] The "standards" were to be enforced by abatement actions brought by state or federal officials. *Id.* at 909.[3] The 1970 amendments obligated federal dischargers to comply with such "standards." 84 Stat. 91, 107 (1970).[4] These amendments were thus similar to the amendments to the air act passed in 1970. The latter amendments authorize the states to adopt a "plan" for the "implementation" and "enforcement" of the "ambient air quality standards" provided in that act, 42 U.S.C. §§ 1857c-4, 1857c-5, and provide for the enforcement of such plans by abatement actions brought by state or federal officials,

2. These provisions were codified in 33 U.S.C. 1160(c)(1) (1970).

3. This provision was codified in 33 U.S.C. § 1160(b)(1970).

4. This provision was codified in 33 U.S.C. § 1171(a)(1970).

*id.* at §§ 1857c-5, 1857c-8, 1857d.[5] As a result of these amendments to the water and air acts, the acts—prior to 1972—sought to achieve similar objectives by similar means.

However, the pre-1972 amendments to the water act still failed to provide an adequate response to the problem of water pollution. By providing standards for "water quality," the amendments focused on the quality of the waters receiving discharges of effluent, not on the quality of the effluent itself. Thus, the primary concern of the amendments was the formulation of *ambient* water quality standards generally applicable to all who discharge effluent into a particular body of water, not the formulation of standards applicable to individual dischargers within that category. In a sense, the amendments focused on the effects, rather than the causes, of water pollution. Many states, unsure of their rights and duties under the act, failed to diligently seek the development of standards for individual dischargers, with the result that the standards in many states reflected the lowest legitimate water uses, such as industrial uses. To fill the resulting void in effective water quality control, federal officials began vigorously enforcing the Refuse Act of 1899, which prohibits the discharge of any matter into the nation's navigable waters except pursuant to a federal permit. 33 U.S.C. § 407 (1899). To restore the balance between federal and state control over water quality, and to strengthen such control, Congress substantially re-constructed the water act by amendments passed in 1972. See generally H.R. Rep. No. 92-911, 92d

5. However, the amendments to the water and air acts were different in that the water act provided that the "standards" were to be developed by the states, and the air act provides that the "standards" are to be developed by the Administrator of the Environmental Protection Agency. *Compare* 79 Stat. 903, 908 (1965), as codified in 33 U.S.C. § 1160(c)(1)(1970), *with* 42 U.S.C. § 1857c-4(a)(1).



Cong., 2d Sess. 124-128 (1972), 1 *Legis. Hist.* 811-815; S. Rep. No. 92-414, 92d Cong., 1st Sess. 69-73 (1971), 2 *Legis. Hist.* 1487-1491; 117 Cong. Rec. 38798-38800, 92d Cong., 1st Sess. (1971) (remarks of Senator Edmund Muskie).[6]

The 1972 amendments radically altered the focus of the act, by providing for standards applicable to individual dischargers through a permit system.[7] First, the amendments authorize the Administrator of the Environmental Protection Agency (the "Administrator") and the states to develop "limitations" and "standards" for discharges of effluent, 33 U.S.C. (Supp. III) §§ 1311, 1312, 1313, 1316, 1317[8], a change from the pre-1972 focus on ambient water quality standards. Second, the amendments provide, in section 402, that these limitations are to be tailored to individual dischargers by a program denominated as the National Pollutant Discharge Elimination System ("NPDES"). *Id.* at § 1342. Under that system, no person may discharge pollutants from a point source, such as a pipe or outfall, into the nation's navigable waters except pursuant to an NPDES permit. *Id.* at §§ 1311,

6. See also Note, *Federal Water Pollution Control Act Amendments of 1972*, 1973 Wis. L. Rev. 893, 893-895 (1973); Note, *Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device*, 10 Harv. Jour. on Leg. 565, 571-572 (1973); Comment, *Local Control of Pollution from Federal Facilities*, 11 S. Diego L. Rev. 972 (1974).

7. These standards are provided in Title III of the act, commencing at section 301, 33 U.S.C. (Supp. III) § 1311. The act also provides for research and related programs in Title I, commencing at section 101, *id.* at § 1251, and for federal grants for construction works in Title II, commencing at section 201, *id.* at § 1281.

8. The Administrator is to develop "effluent limitations" by 1977 and 1983, based on the "best practicable" and "best available" technology, respectively. 33 U.S.C. (Supp. III) § 1311(b). The states may nonetheless adopt more stringent "effluent limitations" than those developed by the Administrator. *Id.* at §§ 1311(b)(1)(C), 1313(e), 1370.

1362(12). Conditions are to be imposed in such permits after administrative hearings, to assure the discharger's compliance with the act. *Id.* at § 1342(a). To assure compliance by federal dischargers with this permit system, section 313 was added to direct such dischargers to comply with state and federal "requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements . . . ." *Id.* at § 1323. Thus, the permit system is the central mechanism by which the act's objectives are to be achieved.[9] After long and frustrating experimentation, Congress finally fashioned a statutory scheme which—by utilizing a permit system—provides a suitably forceful response to the problem of water pollution.

Under the 1972 amendments, the states are expected to bear the major responsibility for administering the NPDES permit system. As Senator Muskie declared during the congressional debate:

> "What it [the bill] does is continue the Federal Government's authority with respect to major polluters . . . until such time as the States can develop permanent authority of their own. At that time it is the expectation of this bill and of this administration to have the States assume that permanent authority and to administer the law directly." 117 Cong. Rec. 38845, 92d Cong., 1st Sess. (1971).[10]

9. Senator Edmund Muskie, the Senate floor leader for the 1972 amendments, summarized "the two major changes" in the act as "the change from water quality standards to effluent limits as the control mechanism, and the use of the permit system against the discharge of pollutants." 117 Cong. Rec. 38799, 92d Cong., 1st Sess. (1971).

10. The Senate report commented on section 402 as follows:

> "It is expected that the States will play a major role in the administration of this program.
>
> "The Committee believes that, after a transition period during which the State program and capability will be upgraded, the program should be administered by those States with programs which meet the requirements of this Act.
>
> "Therefore, the bill provides that after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall suspend his activity in such State under the Federal permit program. The Administrator would periodically assess the performance of the State program and have the authority to withdraw this delegation upon finding that the State is not carrying out its program properly." S. Rep. No. 92-414, 92nd Cong., 1st Sess. 71 (1971), 2 *Legis. Hist.* 1489.



Accordingly, although section 402(a) authorizes the Administrator to develop his own permit program for each state, 33 U.S.C. (Supp. III) § 1342(a), section 402(b) authorizes each state to develop its own permit program to replace that of the Administrator, *id.* at § 1342(b). Once a state program is developed, the Administrator "shall" approve the program if it meets the standards of the act, *ibid.*,[11] and "shall" thereupon suspend its own permit program in that state, *id* at § 1342(c).[12] The Administrator has no discretion to withhold approval of a state permit program which meets the act's standards,[13] and each state thus has the option of making its own permit program applicable within the state.

11. The Administrator may withdraw approval of a state permit program if the state fails to adequately operate and enforce the program. *Id.* at § 1342(c)(3).

12. Permits are to be enforced by actions brought by the Administrator or the states for injunctive relief, fines and civil penalties. *Id.* at §§ 1319(c), 1319(d), 1342(b)(7).

13. H.R. 11896, the bill which originally passed the House, provided that the Administrator "may" approve a state permit program which meets the act's standards. H.R. 11896, 92d Cong., 2d Sess. § 402(a)(5) (1972), 1 *Legis. Hist.* 1054. The Conference Committee changed the word "may" to "shall," in order to require the Administrator to approve such a program "instead of only permitting the Administrator to do so." Conf. Rep. (S. Rep. No. 92-1236), 92d Cong., 2d Sess. 139 (1972), 1 *Legis. Hist.* 322.

The 1972 amendments, although fundamentally altering the focus of the act, nonetheless preserve certain existing features of the pre-1972 act. In particular, section 303(e) allows states to develop "water quality standards" and "implementation plans", subject to the Administrator's approval, if such contain "effluent limitations" which are at least as stringent as those adopted by the Administrator. *Id.* at § 1313(e). Thus, section 303(e) retains the states' old authority to develop standards for ambient water quality, and section 402(b) gives the states new authority to make these standards applicable to individual dischargers by a permit system.

Moreover, the 1972 amendments provide that the states' authority to administer the NPDES permit system is a floor, not a ceiling, with respect to their efforts to prevent water pollution. Section 510 emphasizes that the states may develop a more stringent "standard," "limitation" or "requirement" than those otherwise provided in the act. 33 U.S.C. (Supp. III) § 1370. Thus, the act's oft-repeated declaration that the states bear the "primary responsibilities and rights" in preventing water pollution, reiterated in the 1972 amendments, *id.* at § 1251(b), is not a hollow tribute to the states' sovereignty, but an accurate characterization of the overall statutory scheme.

Thus, as we have demonstrated, the 1972 amendments provide for the development and administration of both *generalized* standards applicable to all dischargers within a particular class, and *particularized* standards made applicable to each discharger within the class by a permit system. The Administrator is primarily responsible for the development of generalized standards, with the states retaining authority—under sections 303(e) and 510—to develop more stringent standards than those of the Ad-



ministrator. Under section 402(b), the states are primarily responsible for developing and administering particularized standards for individual dischargers by the NPDES permit system; the Administrator is to assume this responsibility only until it is assumed by the state, and only thereafter if the state fails to fulfill it. Whether federal dischargers must comply with particularized standards developed by the states under the NPDES system depends on the meaning and effect of sections 402(b) and 313, a question which we shall now examine more closely.

**B. Section 402(b), by Itself, Obligates Federal Dischargers to Comply With State NPDES Permit Programs, and Section 313 Confirms and Clarifies That Obligation.**

The petitioner essentially contends that section 402 contemplates a dual permit program, with the Administrator issuing permits to federal dischargers and the states—after approval of their permit programs—issuing permits to all other dischargers. Nothing in the act suggests this result, however. Section 402(b), in authorizing states to develop permit programs, provides no exemption for federal dischargers from such programs. 33 U.S.C. (Supp. III) § 1342(b). Nor does that section authorize the Administrator, in approving a state permit program, to withhold approval to the extent that the program is applicable to federal dischargers. *Ibid.* Further, section 402(c), in directing the Administrator to suspend his own permit program upon approval of a state program, does not authorize the Administrator to continue his permit program with respect to federal dischargers. *Id.* at § 1342(c). Thus, there is no authority whatsoever in section 402, or elsewhere in the act, for the dual permit program proposed by the petitioner. That section clearly contemplates that *all* dischargers—including federal dischargers—shall be subject to state permit programs adopted under the act.

If any confirmation of our conclusion is necessary, it is found in section 313, which requires federal dischargers to comply with federal and state "requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." 33 U.S.C. (Supp. III) § 1323.[14] The section, in requiring compliance with state "requirements" respecting the "control and abatement" of pollution, obviously includes permits issued by the states under section 402(b), for such permits are the primary means by which water pollution is to be controlled under the act.[15] In requiring such compliance "to the same extent

14. Section 313 provides in full:

"Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 306 or 307 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption."

15. The Senate report, in commenting on section 402, stated:

"[T]he most effective *control* mechanism for point sources



that any person is subject to such requirements," the section obviously insures that federal dischargers will be subject to the same permit program as other dischargers; this reference confirms the lack of authority for the dual permit program proposed by the petitioner. Nothing in section 313 supports the petitioner's claim that the section only includes "substantive" requirements, not "procedural" requirements; by definition, both terms are subdivisions of the word "requirements," and hence encompassed within the statutory phraseology. Thus, section 313, rather than imposing an obligation on federal dischargers independently of other provisions of the act, confirms and clarifies the obligation of such dischargers to comply with permit programs adopted by the states under section 402(b). The section was intended to forestall any claim, such as that asserted by the petitioner here, that federal dischargers are exempt from such programs.[16]

The petitioner asserts, however, that section 313 is only intended to require federal dischargers to comply with those state "requirements" authorized under section 303(e) of the act, 33 U.S.C. (Supp. III) § 1313(e). Brief for the Petitioners (hereinafter "Pet. Brief"), 18. That section, as we have seen, authorizes states to retain their pre-1972 authority to adopt ambient "water quality standards,"

of discharge is one which will provide for the establishment of conditions of effluent *control* for each source of discharge. A permit or equivalent program, properly implemented and fully utilizing the resources of the State and Federal Government should provide for the most expeditious water pollution elimination program." S. Rep. No. 92-414, 92d Cong., 1st Sess. 72 (1971), 2 *Legis. Hist.* 1490. (Emphasis added.)

16. Section 313 also requires compliance by federal dischargers with other types of permits, licenses and control measures issued by the states for the prevention of water pollution, in addition to NPDES permits issued under section 402(b). See n. 23, *infra*.

which are defined in the section as including effluent "limitations" and "standards" under the new act. The terms "effluent limitations" and "standards" are used in a precise and artful sense in the act; these terms denote authority given to the Administrator in sections 301, 302, 303, 306 and 307, and authority given to the states in section 303(e) —repeated in sections 510 and 301—to adopt more stringent "limitations" and "standards" than those of the Administrator.[17] If Congress had intended to limit section 313 to such "limitations" and "standards," it would have employed those terms, or at least made reference to those sections. Instead, by using the broader phrase "requirements respecting control and abatement of pollution," Congress clearly intended to reflect the states' broader authority to adopt NPDES permit programs under section 402. Indeed, in view of the importance which Congress attached to such programs in achieving the act's goals, it would be anomalous to read section 313 as precluding reference to such programs. Hence, the phraseology of the section contradicts the interpretation suggested by the petitioner.

Our conclusion is also supported by the history of section 313. That section succeeded section 21(a) of the pre-

17. Section 301 authorizes the Administrator to develop "effluent *limitations*" at selected target dates, and subdivision (b)(1)(c) thereof authorizes the state to develop more stringent "effluent *limitations*." 33 U.S.C. (Supp. III) § 1311(b). Section 302 authorizes the Administrator to develop "effluent *limitations*" for specific bodies of water. *Id.* at § 1312. Section 303, and particularly subdivision (e) thereof, authorizes the states, subject to the Administrator's approval, to develop "water quality *standards*," including "effluent *limitations*." Id. at §§ 1313(a), 1313(e). Section 306 authorizes the Administrator to develop "national *standards* of performance" for new sources of water pollution. *Id.* at § 1316. Section 307 authorizes the Administrator to develop "toxic and pretreatment effluent *standards*." *Id.* at § 1317. Section 510 authorizes the states to develop a more stringent "*standard*" and "*limitation*" than those of the Administrator. *Id.* at § 1370. (All emphasis has been added.)



1972 act, which required federal dischargers to comply with state "water quality standards." 84 Stat. 91, 107 (1970).[18] Since the states' pre-1972 authority to adopt "water quality standards" was preserved by section 303(e), section 21(a) need not have been changed if—as contended by the petitioner—the 1972 amendments were intended only to preserve the obligation of federal dischargers to comply with state "water quality standards." Hence, by changing the focal reference from "water quality standards" in section 21(a) to "requirements" in section 313, Congress clearly indicated its intent that the latter section is not limited to "water quality standards" adopted by the states under section 303(e).

**C. The Administrator's Authority to Issue Permits to Federal Dischargers Is Based on the Same Provisions Which Provide Such Authority to the States, and Thus the Administrator Has No Greater Authority Than the States to Issue Such Permits.**

The petitioner, in asserting that the "requirements" described in section 313 do not include permits issued under section 402, overlooks the fact that this result would free federal dischargers from *any* permit control under the act, whether exercised by the states *or* the Administrator. The Administrator's authority to issue permits to federal dischargers, in states where he operates his own permit program, is based on sections 402 and 313, the same provisions which provide such authority to the states. Section 402(a) gives the Administrator his authority to operate a permit program, and section 313 requires compliance by federal

18. Although section 21(a) made no specific reference to the authority of the states, the legislative history of the section indicates that state as well as federal "standards" were included within its ambit. H.R. Rep. No. 91-127, 91st Cong., 2d Sess. 19 (1970); *California v. Davidson*, 3 E.R.C. 1157 (N.D. Cal. 1971); *California v. Department of the Navy*, 371 F. Supp. 82, 83 (N.D. Cal. 1973) (dictum).

dischargers with state *and* federal "requirements." Nothing in these sections distinguishes between the authority of the Administrator and the states, with respect to the issuance of permits to federal dischargers. The distinction between their authority depends solely on whether the Administrator has approved a state permit program, not on the identity of the discharger. Hence, the Administrator's authority to issue permits to federal dischargers is based on the identical provisions which provide such authority to the states, and he has no greater power to issue such permits—in states where he operates his own permit program—than the states have elsewhere.

Thus, the Administrator faces an unenviable dilemma, which he has yet to even acknowledge. Either the word "requirements" in section 313 includes permits issued under section 402, or it does not. If it does, then the states have authority to issue permits to federal dischargers. Otherwise, the word "requirements" would be given a varying meaning, depending on whether the permits are issued by the states or the Administrator. Nothing in the act supports such a whimsical, vagarious construction of that term.

On the other hand, if the word "requirements" in section 313 does *not* include permits issued under section 402, federal dischargers would not be bound to comply with permits issued by the states *or* the Administrator. This result would give such dischargers the option of voluntarily complying with the act's permit system, an option which was clearly not intended by the 1972 amendments. In fact, Congress took particular note of the unresponsiveness of federal dischargers to the nation's water quality goals, and the need to strengthen—not weaken—controls over such dischargers. S. Rep. No. 92-414, 92d Cong., 1st Sess. 67 (1971), 2 *Legis. Hist.* 1485. To assure that federal dischargers comply with the NPDES system, section 313 specifically directs such dischargers to comply with state and federal requirements "to the same extent that any person is subject to such requirements." Thus, such dischargers must comply with systems operated by the states—in instances where the Administrator has approved such systems—as fully as they must comply with systems operated by the Administrator. The petitioner, by distinguishing between "requirements" in section 313 and permits issued under section 402, has ignored the double-edged implications of such a distinction.



### D. Other Statutory References Indicate That the Word "Requirements" in Section 313 Includes Permits Issued Under Section 402.

In sections 505, 510 and 313 itself, Congress has provided further indications of the interrelationship between the word "requirements" in section 313 and permits issued under section 402.

1. *Section 505.* Section 505(f), which provides for citizen suits to enforce the act, describes an "effluent standard or limitation" as including "a *permit* or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a *requirement* applicable by reason of section 313 of this Act)." 33 U.S.C. (Supp. III) § 1365(f). (Emphasis added.) This provision *expressly* equates a "requirement" in section 313 with a permit issued under section 402, and thus clearly contradicts the petitioner's argument that the two sections are mutually exclusive.

We are unable to understand the petitioner's discussion of section 505(f). He first points out that the reference to a "requirement" in that section appears at the end of a list of six categories—the last of which is a "permit" issued under section 402—which may be enforced by a citizen suit. Pet.

Brief, 31-32. He then argues, apparently, that since not all of the first five categories can be classified as a "requirement," the sixth category cannot be so classified either. *Ibid.* His conclusion, aside from the fact that it is a *non sequitur,* is based on a misreading of the section. The word "requirement" in the sixth category does not refer to all, or even any, of the first five categories, but only refers to a "permit" described in the sixth category.[19] In other words, the word "requirement" is intended to clarify the meaning of the sixth category, not the preceding five. Thus, section 505(f), on its face, explicitly reads section 313 into section 402.[20]

2. *Section 510.* Section 510, in describing the extent of state authority under the act, specifically distinguishes between a "standard or limitation" in subdivision (1)(A), and a "requirement respecting control or abatement of pollution" in subdivision (1)(B). 33 U.S.C. (Supp. III) § 1370.[21] The reference to a "standards or limitation" obviously connotes those "standards" and "limitations" described elsewhere in the act. Hence, the reference to a "requirement respecting control or abatement of pollution" in section 510 —which is similar to the phrase appearing in section 313— obviously connotes more than such "standards" and "limitations." Thus, section 313 is not limited to the "standards" and "limitations" described elsewhere in the act, but also includes permits issued under section 402.

The petitioner argues, however, that the word "requirement" in section 510 has a different meaning than the word "requirements" in section 313. Pet. Brief, 22-23. He points out that the word "requirements" in section 313 inferentially *includes* the "standards" and "limitations" described elsewhere in the act, and that the word "requirement" in section 510 is differentiated from, and hence arguably *excludes,* such a "standard" or "limitation." *Ibid.* He concludes that section 510, so interpreted, sheds no light on the meaning of section 313.

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19. Section 505(f) provides in full:

"For purposes of this section, the term 'effluent standard or limitation under this chapter' means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this title; (2) an effluent limitation or other limitation under section 301 or 302 of this title; (3) standard of performance under section 306 of this title; (4) prohibition, effluent standard or pretreatment standards under section 307 of this title; (5) certification under section 401 of this title; or (6) a permit or condition thereof issued under section 402 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 313 of this title)."

20. The petitioner also claims that section 505(f) is "borrowed directly" from section 304(f) of the air act, 42 U.S.C. § 1857h-2(f). Pet. Brief, 31. However, the petitioner fails to note that the provision in the air act contains no reference to a "permit," but merely defines a "requirement" as included within a "control or prohibition respecting a motor vehicle fuel or fuel additive." Thus, whatever the other similarities between these provisions in the water and air acts, the provision in the water act expressly ties a "requirement" to a "permit," and the air act does not.



21. Section 510 provides in full:

"Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

The petitioner's argument ignores both the language and purposes of section 510, however. The purpose of the section is to insure that the act will not be construed as preempting the states from adopting "standards," "limitations" and "requirements" at least as stringent as those otherwise provided in the act.[22] Thus, the disjunctive reference to a "standard or limitation," and a "requirement respecting control or abatement of pollution," assures that the states retain the power to impose higher "standards" and "limitations" than those imposed by the Administrator under sections 301, 302, 303, 306 and 307, as well as higher "requirements"—in the form of permits, licenses and other forms of pollution control—than those imposed by the Administrator or the states under the NPDES system established by section 402(b).[23] By making specific reference

22. The report of the House of Representatives commented on section 510 as follows:

> "The Committee considers section 510 to be of extreme importance in assuring the States of the right to adopt or enforce provisions at least as strict as those established in this legislation. Thus, the Committee rejected in most instances suggestions for preemption by the Federal Government and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in section 312(f) relating to marine sanitation devices." H.R. Rep. 92-911, 92d Cong., 2d Sess. 136 (1972), 1 *Legis. Hist.* 823.

23. The NPDES system established by section 402 is limited to the "discharge of a pollutant," 33 U.S.C. (Supp. III) §§ 1342(a)(1), 1311(a), a phrase defined in the act as a discharge into navigable waters from a "point source," such as a pipe or outfall. *Id.* at § 1362 (12). This term is differentiated in the act from "pollution," which is defined as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.* at § 1362(19). Hence, although the phrase "discharge of a pollutant" is limited to point source discharges, the word "pollution" is not so limited, but also includes, for example, runoffs from agricultural lands.

Section 510, in subdivision (1)(B), uses the word "pollution" rather than the phrase "discharge of a pollutant," thus insuring



to a "standard or limitation" in section 510, Congress sought to forestall arguments by those who might argue that the states may adopt systems—such as permit or licensing systems—to prevent water pollution which is not caused by point source discharges. Section 313 also uses the word "pollution" rather than the phrase "discharge of a pollutant," thus insuring that federal agencies must comply with such state systems. If Congress had intended otherwise, it certainly would have so expressed its intention in section 313, rather than using a general phrase—"requirements respecting control and abatement of pollution"—virtually identical to that appearing in section 510. Thus, section 313 requires federal compliance with state programs adopted under both sections 402(b) and 510.

This conclusion is also supported by the legislative history of section 313. According to that history, the section is "similar to one in existing law," a reference to section 21(a) of the pre-1972 act. 84 Stat. 91, 107 (1970); S. Rep. No. 92-414, 92d Cong., 1st Sess. 67 (1971), 2 *Legis. Hist.* 1485. Since section 21(a) antedated the passage of the 1972 amendments, which initiated the NPDES permit system, that section obviously required federal compliance with state control measures other than NPDES programs, and two federal district courts in California have so held. See *California v. Davidson*, 3 E.R.C. 1157 (N.D. Cal. 1971); *California v. Department of the Navy*, 371 F. Supp. 82, 83 (N.D. Cal. 1973) (dictum); cf. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 331 n. 3 (1973) ("requirements" in section 311 of the water act held to include a state "licensing" system different from the NPDES system).

This issue is important in states which, although not operating their own NPDES programs, operate other permit or licensing systems designed to control "pollution," and seek to require federal agencies to comply with such programs. This issue is also important, however, in states which operate their own NPDES programs, and seek to control "pollution" that does not result from point source discharges. For instance, California presently seeks to require a federal agency, the U. S. Bureau of Reclamation, to comply with conditions—designed to prevent "pollution" resulting from salinity intrusion—imposed by California in permits issued to the federal agency to appropriate water for reclamation purposes in California. Since salinity intrusion does not result from a point source discharge, an NPDES permit is not required for such an appropriation of water. However, salinity intrusion clearly results in "pollution" within the act's meaning. This conclusion appears from Senator Muskie's remarks during the congressional debates to the effect that "it is the intent of the conferees and of the bill that such salt water intrusion is pollution as defined in section

that the word "requirement" does not include those terms, that the word should be construed—in the manner urged by the petitioner here—without reference to its common and ordinary meaning. Congress' intent to provide such clarity should not be construed as a basis for interpreting the effect of sections 510 and 313 differently. Its effort to *strengthen* the states' authority in section 510 should not be used to *limit* their authority in sections 402 and 313. Hence, the word "requirement" in section 510 clearly means the same thing as the word "requirements" in section 313. It is not without significance that the petitioner, although disagreeing with this interpretation, has failed to provide an alternative meaning of the word "requirement" in section 510.

3. *Section 313.* Section 313, after describing the obligation of federal dischargers to comply with state "requirements," provides a clarifying example by using the phrase "including the payment of reasonable service charges." 33 U.S.C. (Supp. III) § 1323. The clear meaning of the phrase is that Congress intended to authorize federal dischargers to pay fees to a state for permit applications, such as applications for permits under section 402(b).[24] Such fees con-

502 of the bill." 118 Cong. Rec. 16894, 92d Cong. 2d Sess. (1972). Hence, California may require a permit for the appropriation of such water pursuant to its broader powers in sections 510 and 313. This issue is now in litigation in a federal district court in California. See *State of California v. Morton,* S-2924 (E.D. Cal.). The Court need not address this issue in this case, of course, as this case only involves the authority of the states to apply their NPDES programs to federal dischargers.

24. Our construction of the phrase is supported by a recent statement of Senator Howard Baker, a member of the Senate Committee on Public Works which drafted the water act. Senator Baker stated:

> "It is my recollection that the language on payment of such charges was intended to authorize Federal agencies' compliance with such requirements even if, for example, this meant that an agency had to pay a charge or fee to a State as part of a requirement that the agency obtain a State effluent permit under section 402 of the act." 120 Cong. Rec. S 16644 (daily ed. Sept. 16, 1974).



tain certain characteristics of a tax, and a state is without power to levy a tax on federal agencies in the absence of congressional authorization. See, *e.g., United States v. Allegheny County,* 322 U.S. 174 (1944); *Van Brocklin v. Tennessee,* 117 U.S. 151 (1886). Congress intended to assure such authorization by inserting the clarifying phrase in section 313.[25]

The petitioner argues, however, that the phrase was inserted in section 313 only to authorize federal dischargers to pay charges to local agencies attendant to the collection and treatment of sewage from federal facilities. Pet. Brief, 24. Such charges are voluntarily incurred by the federal discharger as the result of an agreement with the local agency for sewage services; in the absence of such an agreement, a federal agency is not under an obligation to accept such services, nor a local agency under an obligation to provide such services. There can be no question of the authority of federal agencies, aside from the effect of section 313, to pay for services which they voluntarily receive under an agreement. Hence, as the Ninth Circuit properly noted, the petitioner's interpretation of the phrase in section 313 would render it superfluous. 511 F.2d at 970.

25. Federal dischargers have applied for permits from California's water agencies for several years prior to the passage of the 1972 amendments, and have paid the filing fees required by California law. Appendix, 37, 40, 41. Congress may have been aware of this administrative practice, and intended to codify it by inserting the "reasonable service charges" phrase in section 313.

The petitioner concedes that it "might have been unnecessary" for Congress to authorize federal dischargers to pay charges to local agencies for sewage services. Pet. Brief, 24. However, he suggests that Congress, by authorizing only the payment of service charges which are "reasonable," may have inserted the phrase to prevent local agencies from assessing *unreasonable* service charges on federal dischargers. *Id.* at 24-25. This interpretation overlooks the fact that local agencies cannot impose *any* service charges on federal dischargers for sewage services, whether reasonable or not, unless such dischargers seek such services and agree to such charges. Hence, there is no need for legislation to protect such dischargers from "unreasonable" service charges.

Moreover, the petitioner's interpretation is inconsistent with the basic purpose of section 313. The section, in directing that federal dischargers "shall" comply with state requirements to the same extent that others are "subject" to such requirements, *obligates* federal dischargers to comply with certain state laws, rather than *protects* them from this obligation. The purpose of the section was to combat the unresponsiveness of such dischargers to the nation's water quality goals, not the states' efforts to meet those goals. S. Rep. No. 92-414, 92d Cong., 1st Sess. 67 (1971), 2 *Legis. Hist.* 1485. It can hardly be suggested that the section, or any part thereof, was intended to relax the restraints imposed on federal dischargers under the act.

**E. Exemptions for Federal Dischargers from State Programs Adopted Under Sections 308 and 306 Do Not Extend to State Permit Programs Adopted Under Section 402(b).**

The petitioner argues that the states are unable to develop permit programs with respect to federal dischargers which meet the standards set forth in section 402(b). Pet. Brief, 25-29. That section requires, as a condition of the Administrator's approval of a state permit program, that



the state have "adequate authority," *inter alia,* to "apply, and insure compliance with," the provisions of sections 308 and 306, and to "inspect, monitor, enter and require reports" under section 308. 33 U.S.C. (Supp. III) §§ 1342(b)(1)(A), 1342(b)(2)(B). Section 308, which authorizes the Administrator to inspect, monitor and enter a discharger's facilities in enforcing certain provisions of the act, *id.* at § 1318, also authorizes the states to develop procedures for inspection, monitoring and entry, but exempts federal dischargers from such procedures. *Id.* at § 1318(c). Section 306, which authorizes the Administrator to develop "national standards of performance" for new sources of water pollution, *id.* at § 1316, authorizes the states to develop a procedure for applying and enforcing such standards, but exempts federal dischargers from such a procedure. *Id.* at § 1316(c). Since, concludes the petitioner, the states are unable to develop permit programs for federal dischargers which meet the standards of section 402(b), Congress did not intend for the states to apply such programs to federal dischargers.[26]

However, the petitioner's argument is unsupported by the language, purposes or legislative history of section 402(b). That section authorizes a state program entirely different from the programs authorized under sections 308 and 306. The fact that Congress provided an *express* exemption for federal dischargers under the latter sections shows that Congress knew how to exempt such dischargers from state programs. The fact that no similar exemption was expressly provided for federal dischargers from state permit programs under section 402(b) shows that no such

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26. The petitioner notes that the Ninth Circuit, in the decision below, failed to consider this argument. Pet. Brief, 26 n. 55. The petitioner fails to note, however, that he failed to present this argument to the Ninth Circuit.

exemption was intended. Cf. *Continental Casualty Co. v. United States,* 314 U.S. 527, 533 (1942). If Congress had intended to exempt such dischargers from state permit programs, it would undoubtedly have so provided with the clarity which appears in sections 308 and 306. Thus, the fact that exemptions were expressly given to federal dischargers in the latter sections strengthens—not, as concluded by the petitioner, weakens—the conclusion that a similar exemption was not intended under section 402(b). Therefore, although states may not independently monitor federal facilities under section 308, or develop new source performance standards for federal dischargers under section 306, they can acquire similar authority under section 402(b) in instances where their permit program is approved by the Administrator.

It can hardly be suggested that Congress' failure to provide an express exemption for federal dischargers in section 402(b) is the product of accident rather than design. The NPDES permit system conceived in that section is the central mechanism by which the act's objectives are to be achieved, as we have seen. Moreover, the programs authorized under sections 308 and 306, and the exemptions for federal dischargers from such programs, are patterned after identical programs and exemptions found in the air act. See 42 U.S.C. §§ 1857c-6(c), 1857c-9(b). However, the air act does not provide for a program similar to the NPDES permit program found in the water act. This strengthens the inference that a state NPDES program, which is the major innovation of the 1972 amendments to the water act, is fully applicable to federal dischargers.

In fact, the language of section 402(b) itself fails to support the petitioner's position. That section requires, as a condition of the Administrator's approval of a state permit program, that the state have "adequate authority" to issue



permits which insure compliance with the requirements of sections 308 and 306. 33 U.S.C. (Supp. III) § 1342(b). The quoted reference is clarified by the language of the preceding sentence, which requires that "the laws of such State" provide "adequate authority" to carry out the program. *Ibid.* Thus, the section does not require that the state have independent authority under sections 308 and 306 to operate programs under those sections. Rather, the section only requires that *state law itself* provide authority to the appropriate state agency to operate such programs, as part of the NPDES program. The language relied on by the petitioner was merely intended to require the state to build certain features into its permit structure, not to limit the size or scope of the structure. It was intended only to require a state program to attain a minimum level of acceptability, not to impose a maximum level of authority.[27]

If any confirmation of our view is necessary, it is found in the legislative history of section 402(b) itself. That section, as originally passed by the House of Representatives, expressly exempted federal dischargers from the states' authority under an approved NPDES program to "inspect, monitor, enter and require reports" under section 308. H.R. 11896, 92d Cong., 2d Sess. § 402(a)(5) (1972), 1 *Legis. Hist.* 1054. However, this exemption was eliminated by the Conference Committee, and was omitted from the bill which

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27. This conclusion is also supported by the House Report, which discussed section 308 as follows:

> "The individual States participating in the permit program authorized by section 402 are required by section 402 to have the authority to inspect, monitor, enter, and require [reports] to at least the same extent as required in section 308. Such State actions are not a delegation of Federal authority." H. R. Rep. 92-911, 92d Cong., 2d Sess. 114, 1 *Legis. Hist.* 801.

The report thus makes clear that the reference in section 402(b) to section 308 is not an incorporation of the limitation included in the latter section, but a reference to the powers necessary under state law for approval of an NPDES permit system.

Congress finally approved.[28] The House—in exempting federal dischargers from *one* of the elements required to be included in a state permit program—clearly intended for such dischargers to be subject to the remaining elements, including the element relating to new source performance standards under section 306. More importantly, the Conference Committee—in removing the exemption—clearly intended for such dischargers to subject to *all* elements of a state permit program.

Congress' decision to give the states authority under section 402(b) which they independently lack under sections 308 and 306, is based on sound public policy. The primary purpose of allowing a state to enter federal facilities, monitor federal operations and inspect federal records is to allow the state to acquire information in issuing, administering and enforcing NPDES permits applicable to federal dischargers.[29] Thus, there is

28. As originally passed by the House, section 402(b)(2)(B) provided that, as a condition for the Administrator's approval of a state permit program, the state must have authority, "except with respect to sources owned or operated by the United States, to inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act." H.R. 11896, 92d Cong., 2d Sess. § 402(b)(2)(B) (1972), 1 *Legis. Hist.* 1056. The Conference Committee subsequently noted, in commenting on that section:

> "Subsection (b)(2)(B) is revised to remove the exception for federally-owned and operated point sources from inspection, monitoring and reporting requirements." Conf. Rep. (S. Rep. No. 92-1236), 92d Cong., 2d Sess. 139 (1972), 1 *Legis. Hist.* 322.

29. The House report noted that the purpose of such monitoring was "basically for control of the discharge of pollutants and not the gathering of data," and that the right to inspect "is limited to control of discharge of pollutants and not data gathering per se." H. R. Rep. 92-911, 92d Cong., 2d Sess. 114 (1972), 1 *Legis. Hist.* 801.

Further, the Administrator concedes that federal dischargers "are required to provide states with whatever data are needed for standard setting." Pet. Brief, 30 n. 60.



little reason to give a state such control over federal dischargers if the Administrator—rather than the state—administers the NPDES permit program in that state. The same reason does not apply, however, in instances where the state operates its own NPDES program. It would be difficult for a state to effectively administer its NPDES program if it lacks authority over a class of dischargers—federal dischargers—which, according to the act's legislative history, have been notoriously unresponsive to the nation's water quality goals.[30] Moreover, as we shall discuss fully below, the specific procedures which the states must follow in adopting, administering and enforcing their NPDES programs limit the extent to which they can interfere with federal operations. For these reasons, Congress wisely chose not to exempt federal dischargers from state NPDES programs, as it exempted such dischargers from lesser state programs under the act.[31]

30. See quotation in text on page 53, *infra*.

31. The petitioner also notes that federal dischargers are exempt from section 401(a) of the water act, which requires applicants for federal licenses and permits—if such authorize discharges into navigable waters—to secure a certification from the state that the discharge will be in compliance with certain provisions of the act. 33 U.S.C. (Supp. III) § 1341(a). The section also provides that the Administrator shall give such a certification in instances where the state lacks authority to do so. *Ibid.* The petitioner does not claim that a state certification under section 401(a) is a necessary requisite of a state-issued permit under section 402(b), but only that the programs authorized by the sections are "analogous." Pet. Brief, 33. However, the fact that Congress expressly exempted federal dischargers from the states' authority to issue certifications under section 401(a), and expressly gave such authority to the Administrator, demonstrates anew that Congress knew how to exempt such dischargers from state control. Hence, the exemption in that section strengthens the conclusion that no such exemption was intended under section 402(b). Thus, the exemption for federal dischargers in section 401(a) is another example of the limitations, such as those also found in sections 308 and 306, which Congress placed on states which do not administer their own permit programs under section 402(b).

**F. The Petitioner's Distinction Between "Substantive" and "Procedural" Requirements Is Administratively Unworkable, and Not Supported by the Act.**

The weakness of the petitioner's theory of this case is particularly apparent in its actual operation. He concedes that the states may impose "substantive" requirements—in the form of "effluent limitations"—against federal dischargers, but denies their authority to subject such dischargers to "procedural" requirements, such as permits issued under section 402(b). This suggested distinction ignores the fundamental interrelationship between "substantive" and "procedural" requirements under the act, and the extent to which the power to issue the one implies the power to issue the other.

An "effluent limitation" is defined in the act as a restriction imposed by the states or the Administrator on "quantities, rates, and concentrations of chemical, physical, biological, and other constituents" discharged from point sources into navigable waters. 33 U.S.C. (Supp. III) § 1362(11). Hence, an "effluent limitation" includes numerical limitations on the quantity and quality of pollutants which may be discharged into receiving waters. Such limitations are to be developed, first, for categories and classes of dischargers by regulations issued by the Administrator or the states, *id.* at §§ 1311, 1312, 1313, 1316, 1317, 1370, and, second, for individual dischargers by the issuance of NPDES permits under section 402, *id.* at § 1342. In fact, section 505(f), as we have noted, describes an "effluent limitation" as including a "permit or condition thereof issued under section 402 of this Act . . . ." *Id.* at § 1365(f). Thus, an "effluent limitation" may even include a permit issued to a discharger, but at least includes limitations on the quality and quantity of effluent discharges inserted as a condition in the permit.[32]

32. Under California's water quality program, such numerical measurements typically include, *inter alia,* maximum and minimum levels of acidity ("pH"), maximum levels of bio-chemical oxygen demand ("BOD") and maximum levels of suspended solids which may be permissibly contained in discharges of effluent by a particular discharger over a particular period of time.



An "effluent limitation" is also defined in the act as "including schedules of compliance." *Id.* at § 1362(11). The latter phrase is in turn defined as "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation." *Id.* at § 1362(17). Hence, an "effluent limitation" includes not only numerical limitations on the quantity and quality of effluent discharges, but also time limitations—to be enforced by specific remedial measures—within which such numerical limitations must be met. Since the numerical limitations may be inserted as conditions in a permit, the time limitations may also be so inserted. Thus, the petitioner, by conceding the states' authority to develop "effluent limitations" applicable to federal dischargers, concedes the states' authority to formulate conditions—relating both to numerical and time limitations—for permits issued to such dischargers.

The states' authority to formulate such conditions implies authority to administer its conditions as well. Otherwise, a state would be unable to change its conditions in light of changed circumstances, such as a change in the quality of the effluent discharge or of the receiving waters. If a state lacked flexibility to thus change its conditions, it would have no recourse but to bring a legal action whenever the conditions were violated. Thus, to deprive a state of its administrative remedies, in instances when federal dischargers violate conditions formulated by the states, would limit the state to pursuit of its judicial remedies. This result would, of course, promote litigation between state and federal agencies, rather than promote reconcilia-

tion of their differences by administrative means. Hence, the states clearly have authority not only to formulate conditions applicable to federal dischargers, but to administer such conditions as well.

The authority to formulate and administer such conditions clearly implies authority to conduct an administrative hearing for that purpose. Such a hearing enables the state to evaluate the many factors—such as the nature of the activity resulting in the effluent discharge and the nature of the receiving waters—that bear upon the numerical limitations to be included as such conditions. For instance, discharges from a lumber mill create different problems than discharges from a municipality providing sewage service to a large metropolitan area; discharges into a shallow, interior stream create different problems than discharges into the ocean. Further, such a hearing enables the state to evaluate other factors—such as the discharger's capacity to meet these numerical limitations—which bear upon the time limitations to be included as conditions in the permit. Finally, such a hearing enables the state, in instances when its limitations are violated, to ascertain the precise reasons for the violation, thus assisting the state in determining what course of action to take in administering the limitations.

Thus, a federal discharger, unfettered by the obligation to participate in administrative hearings conducted by the state, could prevent the state from acquiring, or even knowing of, information relevant to the formulation and administration of "effluent limitations," notwithstanding the petitioner's concession that such dischargers are subject to such limitations.[33]

33. The impracticality of the petitioner's position becomes particularly apparent when viewed in light of California's NPDES program, the first to be approved by the Administrator. Cal. Wat. Code §§ 13370-13389 (Supp. 1975). Under California's program, any person who discharges, or proposes to discharge, pollutants into navigable waters in California must submit a report of the discharge to the appropriate regional water quality control board. *Id.* at § 13376. Thereafter, the board conducts a hearing to determine whether, and under what conditions, to issue "requirements," the equivalent of a permit, to the discharger. *Id.* at §§ 13374, 13377-13379. The requirements, which are subject to review every five years, *id.* at § 13380, must insure compliance with the effluent limitations and standards contained in the federal water act, *id.* at §§ 13377, 13379. If the nature of the discharge changes, the requirements must be modified or terminated. *Id.* at § 13381. If the requirements are violated, the board, after a further hearing, may issue a cease-and-desist order. *Id.* at §§ 13301, 13386(b), 13387(a). If the cease-and-desist order is violated, the board may seek judicial relief. *Id.* at §§ 13385, 13386, 13387. Thus, if the board cannot conduct an administrative hearing in issuing its requirements, it cannot effectively formulate the contents of such requirements. If, when its requirements are violated, it cannot conduct an administrative hearing in issuing a cease-and-desist order, it cannot adapt its requirements to new exigencies, and thus cannot effectively administer its requirements.



The petitioner argues, however, that section 313 is "silent" as to how the states are to formulate and administer conditions for permits issued to federal dischargers, and thus that such dischargers need only "cooperate" with the states by supplying such information as, in the opinion of the discharger, is sufficient for that purpose. Pet. Brief, 30 n. 60.[34] Section 313, however, is not "silent" on this subject, but rather—by requiring federal dischargers to comply with state requirements "to the same extent that any person is subject to such requirements"—requires federal dischargers to participate in administrative hearings conducted by the states to the same extent that others must so participate. Since California's NPDES program, which has

34. According to the petitioner, the obligation of federal dischargers to "cooperate" with the states is based solely on an executive order issued by the President, and a federal regulation issued by the Administrator. Pet. Brief, 30 n. 60. Under this interpretation, this obligation could thus be withdrawn at the whim of the President or the Administrator.

been approved by the Administrator, requires all dischargers to participate in such hearings, section 313 imposes the same obligation on federal dischargers in California. In fact, the act specifically authorizes a "public hearing" to be conducted for the purpose of formulating "conditions" in NPDES permits. 33 U.S.C. (Supp. III) § 1342(a).

We thus conclude that the states—through the administrative hearing process—may formulate and administer conditions in permits issued to federal dischargers. Given this conclusion, it would be unwise, from the standpoint of sound administrative practice, to forbid the states to issue the permit which contains such conditions. Otherwise, a federal discharger would be required to go to the state to obtain its conditions, go to the Administrator to obtain its permit, and go back to the state to have its conditions changed. Such an unprecedented bifurcation of the administrative process serves no useful purpose, and is awkward, cumbersome and inefficient. The act provides, to the contrary, that:

> "It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government." *Id.* at § 1251(f).[35]

Thus, Congress clearly intended that the authority to formulate and administer conditions in a permit, and the

35. Additionally, the House report commented on section 402 as follows:

> "A system of permits which requires duplicative effort or destroys the initiative of the States and local governments is wasteful and non-productive." H.R. Rep. No. 92-911, 92d Cong,. 2d Sess. 125 (1972), 1 *Legis. Hist.* 812.



authority to issue the permit itself, would reside in the same agency.

In fact, the petitioner, in urging a bifurcation of the administrative process, does not defend this result as consistent with sound administrative practice. Rather, he argues that the authority to issue a permit—as contrasted with the authority to conduct an administrative hearing—enables the state to acquire "control" over federal dischargers, and that this result is inimical to the doctrine of sovereign immunity. Pet. Brief, 30 n. 60. We will fully explore below the extent to which Congress, rather than forbidding such state "control," tightly circumscribed it by providing limited exemptions for federal dischargers from state permit programs, and by imposing restrictions on the states in the adoption, administration and enforcement of such programs. For the moment, however, we need only note that whatever "control" a state acquires over federal dischargers under the act derives from their authority to formulate and administer conditions in permits issued to federal dischargers, not their authority to issue the permit itself. The conditions in such permits—relating to the numerical and time limitations applicable to the discharger—define the nature of the discharger's obligation. Thus, the issuance of the permit itself is merely a ministerial act. If a state may define the nature of the obligation for federal dischargers—as conceded by the petitioner—it acquires no greater "control" over such dischargers by performing the ministerial act of issuing a permit describing the obligation. If the doctrine of sovereign immunity has been waived sufficiently to allow the states to determine the steps which must be taken by federal dischargers in controlling water pollution, there is no reason to retain the doctrine with respect to the issuance of a permit setting forth those steps.

Hence, the petitioner's distinction between "substantive" and "procedural" requirements, which must be rejected for sound administrative reasons, is not supported by any constitutional reasons.

Since the petitioner concedes the states' authority to develop the "substantive" contents of permits issued to federal dischargers, one might wonder why the parties in this case are so concerned about the states' ministerial authority to issue the permit itself. The answer lies in the fact that the petitioner—by seeking to deprive states, such as California, of authority to conduct administrative hearings for federal dischargers—is seeking to deprive such states of the means to formulate and administer the conditions which comprise the "substantive" contents of the permits. Hence, the petitioner, although conceding in theory the states' authority to impose conditions, seeks in practice to deny the states the benefit of that concession. The petitioner apparently seeks to create a *de facto* void which he hopes to fill by formulating and administering his own conditions. In fact, many federal dischargers in California, endorsing the petitioner's interpretation of the act, are now refusing to comply with *any* conditions imposed by California.[36] Thus, this case, rather than presenting a narrow procedural question, presents the broad question whether the states or the Administrator will be primarily responsible for controlling water pollution by federal agencies. Congress has already answered this question, by directing such agencies to comply with state requirements

36. For instance, the U. S. Air Force operates the Norton Air Force Base and Point Arena Radar Station in California. The Air Force refuses to seek NPDES permits from California in discharging waste from the bases into California's waters. The Administrator has issued permits for discharges from both bases, and has refused to insert conditions in the permits as requested by California's water quality control board. Appendix, 37, 41, 47, 51.



"to the same extent that any person is subject to such requirements. . . . " 33 U.S.C. (Supp. III) § 1323. The petitioner, by seeking to expand his power at the expense of the states, is seeking to circumvent a clear expression of the congressional intent.[37]

### G. The Legislative History of the Water Act Does Not Indicate That Federal Dischargers Are Exempt from NPDES Programs Operated by the States Under Section 402(b).

We thus conclude that nothing in the water act, viewed in light of its language, structure and objectives, supports the petitioner's claim that federal dischargers are exempt from permits issued by the states under section 402(b). However, the petitioner argues that his claim is supported by the act's legislative history. He notes that the congressional committee reports preceding the act's passage, in describing the effect of section 313, made reference to "effluent limitations," "other limitations," "effluent standards"—and even "requirements"—but made no reference to permits issued under section 402(b). H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 118-119 (1972), 1 *Legis. Hist.* 805-806; S. Rep. No. 92-414, 92d Cong., 1st Sess. 67 (1971), 2 *Legis. Hist.* 1485; Conf. Rep. (S. Rep. No. 92-1236), 92d Cong., 2d Sess. 135 (1972),

37. We are baffled by the petitioner's additional argument that section 505, which authorizes suits by private citizens to enforce the act, also provides authority for the states to enforce their effluent limitations against federal dischargers, and that in this way Congress took care of the "loophole" caused by the states' inability to enforce their permits against such dischargers. 33 U.S.C. (Supp. III) § 1365; Pet. Brief, 30 n. 61. The act contains no such "loophole" except under the petitioner's interpretation. Section 402(b)(7) authorizes the states to adopt procedures for the enforcement of their permit programs, including procedures for abatement and for civil and criminal penalties. 33 U.S.C. (Supp. III) § 1342(b)(7). Therefore, the act contemplates that the states will enforce their effluent limitations by enforcing their own permits under section 402(b)(7), not that the states will enforce their limitations by the remedies made available to private citizens in section 505.

1 *Legis. Hist.* 318; Pet. Brief, 34-38. According to the petitioner, this shows that the states lack authority to issue permits to federal dischargers under the act.

A more accurate analysis of these reports, however, warrants the conclusion that the reports are silent with respect to the issues in this case. The random scraps of terminology collected by the petitioner reveal only that federal dischargers are subject to effluent limitations issued by the states, not whether such dischargers must comply with permits issued by the states in achieving that objective. Thus, the reports summarize the act's goals, and do not spell out the method by which these goals are to be attained. In the words of the Fifth Circuit, in considering similar reports relevant to the air act, the reports are "more accurately read as a statement of the ultimate goal of the provision rather than as a road map of how to get there." *Alabama v. Seeber,* 502 F.2d 1238, 1246 (5th Cir. 1972), *cert. pending,* No. 75-851.

In fact, the references to "effluent limitations" in the committee reports imply the power to issue a permit, rather than the opposite. We have already noted that the authority to issue such limitations is equivalent to the authority to impose conditions in a permit, which in turn implies authority to issue a permit. These powers are so fundamentally interrelated, so vitally linked in the functioning of a continuous and ongoing process, as to be incapable of the facile distinction urged by the petitioner. In fact, section 505(f), which describes an "effluent standard or limitation" as including a permit issued under section 402, 33 U.S.C. (Supp. III) §1365(f), perhaps indicates the sense in which the committee reports made reference to "effluent limitations" and "standards." In any event, whether these terms *include* a permit, they clearly *imply* the issuance of a permit.



**H. The Administrator's Interpretation of the 1972 Amendments Is, of Itself, Not Entitled to Weight in Construing the Meaning and Effect of the Amendments.**

A well-established rule of statutory construction requires weight to be given to a long-standing interpretation of a statute by the agency charged with its enforcement. See, *e.g., Zemel v. Rusk,* 381 U.S. 1 (1965); *Udall v. Tallman,* 380 U.S. 1 (1964). The petitioner argues that his position, which is supported by a regulation issued by the Administrator, 40 C.F.R. § 125.2(b) (1973), thus gains force from this rule of construction. Pet. Brief, 39-40.

However, this rule of construction has no significance in this litigation.[38] First, the purpose of the rule is to give weight to an administrative interpretation rendered contemporaneously with the statute's passage, or an interpretation which has been unchallenged for such a period of time as to justify the conclusion that the interpretation corresponds with the congressional intent. 2A *Sutherland, Statutory Construction* (4th ed.) 251-252, 255. Here, however, the Administrator issued his regulation substantially after the passage of the 1972 amendments, the regulation was immediately challenged by the states in this litigation and comparatively little time has elapsed since the regulation was issued.[39] Second, the Administrator's regulation

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38. The interpretation of Senator Howard Baker, a member of both the Senate and conference committees which considered the bills which were finally enacted, is obviously entitled to more weight than that of the Administrator, and the senator's interpretation supports the position of the states in this case. See n. 24, *supra.*

39. The petitioner's citations on this point are inapposite. See Pet. Brief, 40 n. 76. In *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 382 (1969), the Court gave effect to "thirty years of consistent administrative construction left undisturbed by Congress . . . ." Similarly, in *New York Dept. of Social Services v. Dublino,* 413 U.S. 405, 420 (1973), the Court gave effect to a "settled administrative policy." In *Zemel v. Rusk,* 381 U.S. 1 (1965), the Court recognized an administrative construction of more than forty years' duration.

was rendered *after* California applied for approval of its NPDES program, and *after* the Administrator approved the program.[40] This sequence suggests that the Administrator's regulation was issued to bolster his position in anticipation of the litigation now before the Court. Third, the states—rather than the Administrator—have the primary responsibility for adopting, administering and enforcing NPDES programs, as we have seen. Thus, the interpretation given by the states to their authority under the water act should, under this rule of construction, carry no less weight than that of the Administrator. Fourth, and most importantly, the issue in this case is of such national importance that it should not be resolved in favor of the petitioner, as against the states, merely because the petitioner says so. For all these reasons, the rule of construction cited by the petitioner, which offers judicial guidance in many cases, offers no such guidance here.[41]

## II. The Constitutional Principles Contained in the Supremacy Clause and Plenary Powers Clause Do Not Bar the Issuance of State Permits to Federal Dischargers Under the Water Act, Because the States Are Carrying Out Congressional Policy in the Manner Directed by Congress.

The petitioner argues that this case should be decided in accordance with the traditional principles of federalism con-

40. California applied to the Administrator for approval of its NPDES permit program on February 15, 1973, and provided supplementary information on April 10, 1973. Appendix, 15. The program was approved by the Administrator on May 14, 1973. *Id.* at 18-19. The Administrator issued his regulation, limiting the effect of state NPDES permit programs to non-federal dischargers, on May 22, 1973. 38 Fed. Reg. 13530 (1973).

41. The petitioner also points out that his position is sustained by a presidential executive order. Exec. Order No. 11752, 38 Fed. Reg. 34793-34797 (1973); Pet. Brief, 40 n. 77. However, as noted by the Ninth Circuit, this executive order was issued *after* this litigation had commenced, a sequence which suggests that the executive order was intended to strengthen the petitioner's position in this case. 511 F.2d at 971 n. 13.



tained in the Supremacy Clause and Plenary Powers Clause of the U. S. Constitution, which—in the absence of congressional authorization—prohibit the states from regulating federal activities or federal enclaves. Pet. Brief, 17-20.[42] We do not assert, of course, that the states have power to regulate federal activities on federal enclaves, or elsewhere, in the absence of congressional authorization; rather, we assert that such authorization is found in the water act. We do not, and could not, urge that conflicts between federal and state law be resolved in favor of state law; rather, we urge that no such conflict exists here, that the position of the states in this case is based fully on federal law. Nor does the petitioner claim to perceive any such conflict, given our interpretation of the water act. Rather, he claims only that constitutional principles have *traditionally* operated to bar state regulation of federal activities or enclaves, and that this tradition should be followed in this case in the absence of a clear and unambiguous congressional expression to the contrary. Pet. Brief, 17-20.

42. Under the Supremacy Clause, a state may not interfere with the performance of a federal function, in the absence of congressional authorization. U. S. Const., Art. VI, Cl. 2; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Johnson v. Maryland*, 254 U.S. 51 (1920); *Ohio v. Thomas*, 173 U.S. 276, 283 (1889); *Mayo v. United States*, 319 U.S. 441, 446 (1943). Under the Plenary Powers Clause, Congress has "exclusive" legislative power over federal enclaves, and a state may not apply its laws on such enclaves in the absence of congressional authorization. U. S. Const., Art. I, § 8, Cl. 17; *Paul v. United States*, 371 U.S. 245, 263 (1963); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186 (1937).

However, Congress acquires "exclusive" legislative power over a federal enclave only if the state "consents" to federal acquisition of the enclave, or thereafter "cedes" its legislative authority over the enclave to the federal government. *Paul v. United States, supra* at 264; *James v. Dravo Contracting Co., supra* at 141-142; *Silas Mason Co. v. Tax Comm'n, supra* at 197. Thus, the Plenary Powers Clause does not bar state regulation of a federal enclave in instances where the state has not given such "consent" or otherwise "ceded" its authority. *Ibid.*

We believe, of course, that Congress has clearly and unequivocally indicated that federal dischargers are subject to state permit programs under the act. Moreover, the oft-repeated federal principles cited by the petitioner have traditionally been applied in cases where the state asserted its own inherent, reserved powers to achieve a policy peculiar to the state; the only question in those cases was whether Congress meant to tolerate the exercise of such powers over federal activities or enclaves. For instance, in *Ohio v. Thomas,* 173 U.S. 276 (1889), the state sought to regulate the sale and use of oleomargarine at a federal soldiers' home, pursuant to its police power; the Court rejected the states' position on grounds that Congress did not intend for the state to so apply its laws. These constitutional principles are of less help in this case, however. Here, the states—rather than acting pursuant to their reserved powers to achieve policies set by the states—are acting pursuant to a congressional directive to achieve a national goal set by Congress. The power asserted by the states in this case thus flows from the congressional power, as contained in the water act, not from the states' police powers or other residual powers. Having been enlisted by Congress to spearhead the nationwide fight against water pollution, the states are functioning as Congress' own legions, not as defenders of their own bastions of sovereignty. California seeks only to fulfill its role as an instrument of congressional policy, in implementing a permit system denominated as the *National* Pollutant Discharge Elimination System. Nothing in the constitutional principles cited by the petitioner suggests an inference that the states may not so act, even to the extent of regulating federal activities and enclaves.

Underlying these constitutional principles, of course, is the fear that a state may impose undue burdens on the performance of federal functions, thus impeding the objectives of federal law. See, *e.g., Johnson v. Maryland,* 254 U.S. 51 (1920). We could respond simply that Congress concluded that the objectives of the water act outweigh the risks of such burdens. Or we could respond that, since the states concededly have authority to impose such burdens by virtue of their authority to impose "substantive" limitations on federal dischargers, little additional burden results from their "procedural" authority to issue permits.[43] However, neither response wholly dispels the fear that some states, in moments of unbridled enthusiasm, might impose conditions on federal dischargers which *unduly* impair the performance of federal functions, or even threaten the national interest.



Congress, aware of this danger, avoided it not by preventing the states from exercising any control over federal dischargers, but rather by building safeguards in the act to limit the extent of such control. Section 313, for example, authorizes the President to exempt effluent sources of federal agencies from state permit programs if such is in the "paramount interest" of the United States. 33 U.S.C. (Supp. III) § 1323. The section also authorizes the President to provide such an exemption if funds are unavailable to meet the act's requirements, but only if such funds were requested by the President but not approved by Congress. *Ibid.* These provisions allay any fear that the states will unduly impair the performance of vital federal functions, and thus serve to protect the same national interests as the constitutional principles cited by the petitioner.

Moreover, additional safeguards are found in the elaborate procedures devised by Congress for the adoption,

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43. The Ninth Circuit, in the case below, characterized the function of such permits as to "certify" compliance with the "limitations" and "standards" of the act. 511 F.2d at 968.

administration and enforcement of state permit programs. First, the act provides that a state NPDES permit program must contain nine elements, none of which—as noted by the petitioner—may be excluded at the option of the state. 33 U.S.C. (Supp. III) §§ 1342(b)(1)-1342(b)(9); Pet. Brief, 25 n. 54. Second, the act provides for extensive federal review of such programs, both before and after their adoption. For instance, such programs cannot become effective unless approved by the Administrator, 33 U.S.C. (Supp. III) § 1342(b), and such approval must be withdrawn if the state fails to properly administer its program, *id.* at § 1342(c). The Administrator can disapprove the issuance of an individual permit by the state, *id.* at § 402(d)(2), and can enforce a state permit if the state fails to do so, *id.* at § 1319. Thus, the states' discretion under the act is sufficiently circumscribed to dispel any fear that the states will unduly impair the performance of federal functions. If such an impairment nonetheless results, Congress retains the ultimate power to revoke the authority of the states, individually or collectively, under the act.

This statutory scheme thus fails to present the constitutional concerns raised in cases where Congress has adopted state law as a form of "surrogate" federal law.[44] For instance, in *United States v. Sharpnack*, 355 U.S. 286 (1958), the Court considered the constitutionality of the Assimilative Crimes Act of 1948, which made the laws of each state —including laws yet to be enacted—applicable on federal enclaves within the state. The Court, in upholding the constitutionality of the act, noted that such state laws become part of the body of the federal law, and stated:

44. There are other examples of such federal laws. See, *e.g.*, Outer Continental Shelf Act, 43 U.S.C. § 1333(a)(2); Federal Tort Claims Act, 28 U.S.C. § 1346(b).



> "This procedure is a practical accommodation of the mechanics of the legislative functions of State and Nation in the field of police power where it is especially appropriate to make the federal regulation of local conduct conform to that already established by the State." *Id.* at 294.

Here, Congress did not even proceed to the constitutional brink, as it did in the *Sharpnack* case. The water act does not assimilate the varying and random laws of the state into a disjointed body of federal law; rather, it provides specific procedures which the states must follow in achieving a specific national objective, and provides for federal review of state action. Rather than blindly dumping all the states' laws into a federal hopper, the act carves out a narrow pathway for the states to tread in arriving at a particular destination, and employs a federal guide to assure that the states do not lose their way.

In authorizing the states to bear the primary burden in preventing water pollution, and directing federal dischargers to comply with state requirements towards that end, Congress achieved an accommodation between federal and state interests which significantly contributes to the act's objectives. Many states have acquired a keen familiarity, borne out of long experience, with local water quality problems. These problems vary from state to state, and community to community. For instance, the water quality problems of the populous, industrial northeastern states contrast sharply with those of the semi-arid, agrarian western states. Congress obviously did not intend—except as otherwise expressly provided in the act—for the Administrator to develop national standards for federal dischargers, oblivious to state and local water needs and uses. Rather, Congress intended for such dischargers to bear, equally with other dischargers, the burdens imposed b

state and local communities. It would be difficult to achieve the act's objective if some dischargers were exempted from the standards which are applied to others. To the contrary, Congress intended that "Federal facilities shall be a model for the Nation," and "shall be required to meet all requirements as if they were private citizens." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 118-119 (1972), 1 *Legis. Hist.* 805-806.

Moreover, many states have acquired abundant resources —in terms of skills, manpower and experience—in the field of water quality control, and Congress obviously intended to marshal and deploy these resources in the fight against water pollution.[45] It is doubtful if the Administrator, with his many environmental concerns and limited staff, could easily duplicate these resources in most states. Finally, Congress may also have believed that the states are less likely to be sensitive to those internal bureaucratic pressures which federal dischargers may exert on the Administrator—himself a member of the federal bureaucracy—and thus are more likely to be sensitive to the public interest itself. For all these reasons, the act produces not only a total national commitment to the problem of water pollution, at all levels of government, but also a practical and workable solution to the problem.

45. For instance, California's NPDES permit program, adopted in 1972, supplements, and is similar to, a stringent and highly effective water quality control act adopted in 1969, the Porter-Cologne Act. Cal. Wat. Code §§ 13020-13361. The latter act also provides for the issuance of "requirements," the equivalent of permits, to individual dischargers. *Ibid.* That act superseded California's first statutory effort at water quality control, the Dickey Act, which was enacted in 1949. 1949 Cal. Stat., ch. 1549. The success of California's water quality programs is perhaps best revealed by the Administrator's comment that California's "actions in the past have shown that water quality can be controlled." Appendix, 18.



## III. Although the States' Authority to Issue Permits to Federal Dischargers Under the Water Act May Be Helpful in Analyzing Their Authority to Do So Under the Air Act, Their Authority Under the Air Act Sheds No Light on the Extent of Their Authority Under the Water Act.

Section 313 of the water act is similar to section 118 of the air act, which provides that federal agencies must comply with state "requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." 42 U.S.C. § 1857f. The petitioner argues that, because of the similarity of these sections, they must be construed similarly. Pet. Brief, 14, 21. He also argues that, because section 118 was enacted prior to section 313, the latter section must be given the same meaning as the former. *Ibid.* He thus concludes that the Court should reach the same conclusion in this case and in *Kentucky ex rel. Hancock v. Ruckelshaus,* 492 F.2d 1172 (6th Cir. 1974), *cert. granted sub. nom. Kentucky ex rel. Hancock v. Train,* No. 74-220.

The difficulty with the petitioner's argument is that it ignores the fundamentally different approaches of the water and air acts to the problem of pollution. This difference results from the fact that the water act was substantially amended in 1972, and the air act was not. Prior to the 1972 amendments, the approaches of the acts were virtually identical. Both acts provided for the development of ambient "standards" for polluters, and for state "plans" to "implement" the "standards." *Compare* 79 Stat. 903, 908 (1965), *with* 42 U.S.C. §§ 1857c-4, 1857c-5.[46] The

46. Although section 118 of the air act requires federal agencies to comply with "requirements," the pre-1972 water act required such agencies to comply with water quality "standards." *Compare* 42 U.S.C. § 1857f, *with* 84 Stat. 91, 107 (1970). This difference evidently derives from the fact that the ambient "standards" of the acts were defined differently. Under the air act,

authority of the states to tailor these "standards" to individual polluters, including federal agencies, by a permit system arose only by implication.

However, the 1972 amendments to the water act removed any ambiguities concerning the states' authority to issue permits under that act. The amendments expressly authorize the states to develop limitations for individual dischargers by an NPDES permit program, and provide no exemption for federal dischargers. In this context, section 313 clearly confirms the obligation of federal dischargers to comply with such permit programs. This clarity is not found in section 118, of course, since the air act contains no equivalent permit system.

We do not necessarily resist the conclusion, however, that sections 313 and 118 should be read similarly. Indeed, there are many similarities in the language, structure and legislative history of the acts which support this conclusion.[47] Perhaps the 1972 amendments to the water act,

"standards" are different from the "plans" by which they are implemented. 42 U.S.C. § 1857c-4, 1857c-5. However, under the pre-1972 water act, "standards" included the "plan" to implement the "water quality criteria" of the act. 79 Stat. 903, 908 (1965). Thus, Congress apparently used the word "requirements" in the air act to insure that federal agencies are subject to such "plans," but was content to use the word "standards"—which already included such "plans"—in the pre-1972 water act.

47. For instance, both acts provide that the "primary" responsibility for preventing pollution rests with the states. *Compare* 33 U.S.C. (Supp. III) § 1251(b), *with* 42 U.S.C. § 1857(a)(3). Both contain a section authorizing the states to develop a more stringent "standard or limitation," and a more stringent "requirement" respecting the "control and abatement" of pollution than those otherwise provided in the acts. *Compare* 33 U.S.C. (Supp. III) § 1370, *with* 42 U.S.C. § 1857d-1. Both allow states to adopt "schedules" for "compliance" with the plans or programs developed by the states under the acts. *Compare* 33 U.S.C. (Supp. III) § 1362(11), *with* 42 U.S.C. § 1857c-5(a)(2)(B).

The legislative history of both acts is also similar. The congressional reports describing the effect of section 313 made reference



which removed the ambiguities which might still remain in the air act, provide a clue to the meaning of the air act, with respect to the issues in this and the *Kentucky* case; perhaps the NPDES permit system fathered by the water act is an approximation of the type of program which Congress expected the states to develop in adopting "implementation plans" under the air act. However, the converse is not true. The air act, which lacks the clarity found in the 1972 amendments to the water act, sheds no light on the meaning of those amendments, with respect to the issues here. Thus, if sections 313 and 118 are to be interpreted harmoniously, section 118 must be interpreted in light of the meaning of section 313, not—as contended by the petitioner—*vice versa*.

Another option is open to the Court, of course. The fundamental dissimilarities of the water and air acts, particularly with respect to the states' authority to adopt NPDES permit programs under the water act,[48] might be

to "effluent limitations," "standards," and so forth. See pp. 38-39, *supra*. The congressional reports describing the effect of section 118 made reference to "applicable standards of air quality and emissions." Conf. Rep. (H.R. Rep. No. 91-1783), 91st Cong., 2d Sess. 48 (1970). None of these reports indicated whether the states may issue permits to federal agencies.

48. The acts contain dissimilarities other than with respect to the states' authority to adopt NPDES permit programs. For instance, section 505(f) of the water act describes an "effluent standard or limitation" as including a "permit" issued under section 402, and the latter as including a "requirement" under section 313. 33 U.S.C. (Supp. III) § 1365(f). Section 313 of the water act provides an example of such "requirements" by using the phrase "including the payment of reasonable service charges." *Id.* at § 1323. No similar provisions are found in the air act.

Additionally, the water act expressly allows the states to enforce their permit programs by injunctions and civil and criminal penalties. *Id.* at § 1342(b)(7). The air act, by way of contrast, does not indicate how the states are to enforce the "implementation plans" adopted under that act. Also, the water act expressly allows

construed as denoting a congressional intent that sections 313 and 118 are to be construed differently. Under this approach, the states would have authority to issue permits to federal agencies under the water act, but not under the air act. Because of these options, the Ninth Circuit, in upholding the states' position in this case, properly observed that its decision is consistent with an affirmance or reversal of the Sixth Circuit's decision in the *Kentucky* case. 511 F.2d at 973.

Therefore, the petitioner, in arguing that sections 313 and 118 must be read harmoniously, ignores the fundamentally different contexts of these sections, and oversimplifies the task which faces the Court. Rather than proceeding on the assumption that the sections must be read *in pari materia,* the Court must examine the similarities and dissimilarities of the acts to determine whether that assumption is correct. Because of the greater clarity found in the water act, section 313 might illuminate the meaning of section 118, but the reverse is not true. Thus, the issues in this case may be helpful in resolving the issues in the *Kentucky* case, but the issues in that case provide no guidance here.

## CONCLUSION

The water act reposes in the states the primary responsibility in achieving the national goal of improved water quality, and prevention of water pollution. The Administrator is to act as a general overseer of the states' actions

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the states to bring actions against the Administrator to compel adoption of a state permit program. *Id.* at § 1369(b)(1)(D). The air act, however, does not expressly indicate that the states may bring actions against the Administrator to compel adoption of a state implementation plan, although such authority is arguably found in sections 118 and 304 of that act. 42 U.S.C. §§ 1857f, 1857h-2.



in meeting that responsibility, and—in instances where a state fails to meet it—to assume it directly. He is not, however, to assume responsibility over a class of dischargers—federal dischargers—in instances where a state is meeting its responsibility in the manner intended by Congress.

Indeed, the states cannot adequately meet the responsibility entrusted to them if they lack authority to control water pollution by federal dischargers. Without minimizing the extent to which other dischargers—particularly industrial and municipal dischargers—have contributed to the nation's water quality problem, federal dischargers have also significantly contributed to the problem. As Congress noted:

> "Evidence received in hearings disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort." S. Rep. No. 92-414, 92d Cong., 1st Sess. 67 (1971), 2 *Legis. Hist.* 1485. Accord, H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 118 (1972), 1 *Legis. Hist.* 805.

In California, for example, the Navy, which operates a series of bases that ring San Francisco Bay, is among the largest polluters of the bay. To immunize federal dischargers from the states' water quality effort, by immunizing them from the permit programs which form the very heart of that effort, would impede the states in achieving the very goal which Congress—after years of experimentation and months of debate—deemed to be of the highest national importance.

California, in developing a stringent water quality program based on the NPDES system, has properly responded

to the congressional mandate contained in the water act. The petitioner, in seeking to prevent the application of that program to federal dischargers, is seeking to limit the effect of California's program, and to expand his power at California's expense. His effort shows little regard for the clear expression of congressional intent found in the water act, and denies California the control and responsibility over her resources envisioned by Congress. If the Administrator wishes to change the act, his remedy is with Congress, not the courts. We thus urge affirmance of the judgment of the Ninth Circuit.

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